No. 87-636

In the Supreme Court of the United States

OCTOBER TERM, 1988

EFTHIMIOS A. KARAHALIOS, PETITIONER

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES FRIED
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. TARANTO
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM E. PERSINA
Acting Solicitor

ARTHUR A. HOROWITZ
Associate Solicitor
Federal Labor Relations Authority
Washington, D.C. 20424

QUESTION PRESENTED

Whether a federal employee who alleges that his exclusive bargaining representative breached its duty of fair representation has a cause of action to bring suit for damages in a federal district court, or whether his exclusive federal remedy is to file an unfair labor practice charge with the Federal Labor Relations Authority.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of Argument	7
Argument	9
A federal employee has no implied private right of action in federal court to seek damages for his exclusive bargaining representative's breach of its duty of fair representation	9
Conclusion	31

TABLE OF AUTHORITIES

Cases:

AFGE v. *FLRA*, 812 F.2d 1326 (10th Cir. 1987)	10
AFGE, Local 1857, 28 F.L.R.A. No. 86 (Aug. 21, 1987)	16
Army & Air Force Exch. Serv. v. *Sheehan*, 456 U.S. 728 (1982)	26
Arnett v. *Kennedy*, 416 U.S. 134 (1974)	27
Bowen v. *United States Postal Service*, 459 U.S. 212 (1983)	29
Bureau of Alcohol, Tobacco & Firearms v. *FLRA*, 464 U.S. 89 (1983)	21, 22
Bush v. *Lucus*, 462 U.S. 367 (1983)	23
California v. *Sierra Club*, 451 U.S. 287 (1981)	14
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	14, 20, 23
Connell Constr. Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975)	12
Daily Income Fund, Inc. v. *Fox*, 464 U.S. 523 (1984)	14
Devine v. *Pastore*, 732 F.2d 213 (D.C. Cir. 1984)	27
FLRA v. *Aberdeen Proving Ground*, No. 86-1715 (Apr. 4, 1988)	27
Ft. Bragg Ass'n of Educators, 28 F.L.R.A. No. 118 (Sept. 4, 1987)	10
Int'l Ass'n of Machinists & Aerospace Workers, Local 39, 24 F.L.R.A. 352 (1986)	16

Cases – Continued: Page

Kaiser Steel Corp. v. *Mullins*, 455 U.S. 72 (1982) 12
Kuhn v. *National Ass'n of Letter Carriers*, 570 F.2d 757 (8th Cir. 1978) 21
Laborers Health & Welfare Trust Fund v. *Advanced Lightweight Concrete Co.*, No. 85-2079 (Feb. 23, 1988) 12
Leath v. *Stetson*, 686 F.2d 769 (9th Cir. 1982) 30
Local 1498, AFGE v. *AFGE*, 522 F.2d 486 (3d Cir. 1975) 21
Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134 (1985) 15, 17
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982) 20, 22
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 14
Morales v. *MSPB*, 823 F.2d 536 (Fed. Cir. 1987) 27
National Federation of Federal Employees, 24 F.L.R.A. 320 (1986), petition for review dismissed *sub nom. Thompson* v. *FLRA*, 830 F.2d 1130 (11th Cir. 1987) ... 25
National R.R. Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) 17
National Treasury Employees Union, 10 F.L.R.A. 519 (1982), aff'd, 721 F.2d 1402 (D.C. Cir. 1983) 24-25
National Treasury Employees' Union v. *FLRA*, 800 F.2d 1165 (D.C. Cir. 1986) 10, 27
Naylor v. *AFGE Local 446*, 580 F. Supp. 137 (W.D.N.C. 1983), aff'd, 727 F.2d 1103 (4th Cir.), cert. denied, 469 U.S. 850 (1984) 12
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77 (1981) 13, 14, 17
Pham v. *AFGE, Local 916*, 799 F.2d 634 (10th Cir. 1986) 12
San Diego Bldg. Trades Council v. *Garmon*, 359 U.S. 236 (1959) 12
Serrano Medina v. *United States*, 709 F.2d 104 (1st Cir. 1983) 30
Steele v. *Louisville & N.R.R.*, 323 U.S. 192 (1944) 5, 20, 23

Cases – Continued: Page

Stevens v. *Carey*, 483 F.2d 188 (7th Cir. 1973) 21
Thompson v. *Thompson*, No. 86-964 (Jan. 12, 1988) 7, 13
Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) ... 17, 28
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 14, 15, 17, 19, 23
United States v. *Fausto*, No. 86-595 (Jan. 25, 1988) .. 19, 22, 30
United States v. *Professional Air Traffic Controllers Org.*, 653 F.2d 1134 (7th Cir.), cert. denied, 454 U.S. 1083 (1981) 21
United States v. *Testan*, 424 U.S. 392 (1976) 27
Universities Research Ass'n v. *Coutu*, 450 U.S. 754 (1981) 15
Vaca v. *Sipes*, 386 U.S. 171 (1967) 9, 20, 23, 24, 25, 26, 28, 29
Warren v. *Local 1759, AFGE*, 764 F.2d 1395 (11th Cir.), cert. denied, 474 U.S. 1006 (1985) 12, 28
Wilson v. *United States Bureau of Prisons*, 770 F.2d 1078 (3d Cir. 1985) (Table), aff'g 585 F. Supp. 202 (M.D. Pa. 1984) 12
Yates v. *Soldiers' & Airmen's Home*, 533 F. Supp. 461, (D.D.C. 1982) 30

Statutes and regulations:

Civil Service Reform Act of 1978, Tit. VII, 5 U.S.C. (& Supp. IV) 7101 *et seq.* 4, 13, 15
5 U.S.C. 7105(g)(3) 16
5 U.S.C. 7106 27
5 U.S.C. 7114(a)(1) 6, 7, 9, 10, 13, 14, 15, 22
5 U.S.C. 7114(a)(5) 26
5 U.S.C. 7116 ..... 12, 17
5 U.S.C. 7116(b) 10
5 U.S.C. 7116(b)(8) 15
5 U.S.C. 7117 ..... 25, 27
5 U.S.C. 7118 ..... 10, 11, 12, 15, 17
5 U.S.C. 7121(e)(1) 27
5 U.S.C. (& Supp. IV) 7122 25
5 U.S.C. 7123 ..... 16, 20, 25
5 U.S.C. 7123(a) 13, 16

Statutes and regulations – Continued:	Page
5 U.S.C. 7123(b)	13, 16
5 U.S.C. 7123(c)	16
5 U.S.C. 7123(d)	13
5 U.S.C. 7701	27
Labor-Management Relations Act, 1947, § 301, 29 U.S.C. 185	5, 25, 29
National Labor Relations Act, 29 U.S.C. 151 *et seq.*	10
Railway Labor Act, 45 U.S.C. 151 *et seq.*	10
28 U.S.C. 1331	4, 13, 21
28 U.S.C. 1346(a)(2)	4, 30
28 U.S.C. 1491	4, 30
Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.)	21
Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.)	21, 22
Exec. Order No. 11,616, 3 C.F.R. 605 (1971-1975 comp.)	21
Exec. Order No. 11,636, 3 C.F.R. 634 (1971-1975 comp.)	21
Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975 comp.)	21
48 C.F.R.:	
Section 37.104(a)	26
Section 37.104(b)	26
Miscellaneous:	
Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361 (1987)	21
124 Cong. Rec. 38717 (1978)	17-18
H.R. Rep. 95-1403, 95th Cong., 2d Sess. (1978)	18, 22
H.R. Rep. 95-1717, 95th Cong., 2d Sess. (1978)	18, 22, 29
Letter to Petitioner's Counsel from Assistant General Counsel for Appeals (Nov. 24, 1980)	29
S. Rep. 95-969, 95th Cong., 2d Sess. (1978)	18, 19, 22

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-636

EFTHIMIOS A. KARAHALIOS, PETITIONER

v.

DEFENSE LANGUAGE INSTITUTE/FOREIGN LANGUAGE CENTER, PRESIDIO OF MONTEREY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether a federal employee who alleges that his exclusive bargaining representative breached its duty of fair representation has a private federal cause of action for damages and therefore may sue the union in federal district court, or whether instead his exclusive federal remedy is to file an unfair labor practice charge with the Federal Labor Relations Authority. The case thus directly involves the rights of federal employees and the functions of a federal agency. This Court, prior to granting the petition for a writ of certiorari, invited the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Petitioner, Efthimios Karahalios, is employed by respondent-employer, Defense Language Institute/

Foreign Language Center, Presidio of Monterey (DLI), as a Greek language instructor (Pet. App. 3a). In 1976, he applied for promotion to a newly created "course developer" position (*ibid.*). As part of the application process, petitioner took a competitive examination (*ibid.*). Based on his test score and other qualifications, DLI initially selected petitioner to fill the "course developer" position (*ibid.*).

Respondent union, the National Federation of Federal Employees, Local 1263, which represents the bargaining unit of which petitioner is a non-union member, subsequently filed a grievance protesting the selection process that DLI used in selecting petitioner for the "course developer" position (Pet. App. 3a). Specifically, respondent union complained that one of the other members of the bargaining unit, Simon Kuntelos, had been demoted from such a course developer position when that position was eliminated in an earlier reorganization of DLI and that Kuntelos was entitled to, but had not received, some non-competitive consideration for the new course developer position (*ibid.*). Respondent union did not advise petitioner that it had filed this grievance (*id.* at 6a). Nor did it advise him when it decided to pursue Kuntelos's grievance to arbitration (*ibid.*). Rather, petitioner learned of the union's actions only after an arbitrator, in August 1977, ordered DLI to reconstitute its "course developer" selection process (in accordance with certain guidelines specified in the award) and to reconsider its promotion of petitioner (*id.* at 3a-4a).

As a result of the arbitrator's ruling, DLI allowed Kuntelos to take the competitive examination that petitioner had taken (Pet. App. 4a). In addition, DLI provided Kuntelos with substantially more time to complete the examination than had been afforded to petitioner

(*ibid.*). Kuntelos received a score on the examination that was two points higher than petitioner had received (*ibid.*). DLI then demoted petitioner—*i.e.*, reduced his grade and pay—and promoted Kuntelos to the course developer position (*ibid.*).[1]

Petitioner objected to his demotion and filed two grievances with DLI, arguing, among other things, that DLI had used improper testing procedures in selecting Kuntelos (Pet. App. 4a; J.A. 85). Petitioner had union representation throughout the grievance process (J.A. 85). DLI denied the grievances (Pet. App. 4a). Petitioner requested that respondent union take his grievances to arbitration, but the union declined to do so; it told petitioner that its earlier arbitral efforts on behalf of Kuntelos precluded it from seeking arbitration on his behalf (*ibid.*).

Petitioner responded by filing with the Federal Labor Relations Authority (FLRA) unfair labor practice charges against both DLI and the union (Pet. App. 4a). He alleged that DLI had breached the collective bargaining agreement by its actions and that respondent union had breached its duty of fair representation by not seeking arbitration on his behalf (*id.* at 5a). The FLRA's General Counsel disagreed with petitioner's breach of contract claim but agreed with the duty of fair representation claim and issued a complaint to that effect against respondent union (*id.* at 4a). But when respondent union agreed to post a notice to all bargaining unit employees, stating that in the future the union would not inform employees that it is unable to represent more than one employee competing for a position, the regional director of the FLRA, without consulting with petitioner, settled the complaint (*ibid.*).

---

[1] Kuntelos held the "course developer" position from May 1978 to October 1979, at which time the position was again abolished (Pet. App. 4a).

2. After unsuccessfully appealing the regional director's decision to the FLRA's General Counsel, petitioner filed this suit against DLI and the union in federal district court, alleging that DLI had breached the collective bargaining agreement and that the union had breached its duty of fair representation (J.A. 48-68; see Pet. App. 4a-5a). The district court held that Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. (& Supp. IV) 7101 *et seq.*, imposes on a union of federal employees an "implied duty of fair representation" and that that implied duty is privately enforceable in federal court under 28 U.S.C. 1331 (J.A. 56-58; see Pet. App. 5a). The court expressly rejected respondents' argument that the CSRA's unfair labor practice provisions and procedures provide the sole means for enforcing the union's duty of fair representation, reasoning that the unfair labor practice provisions and procedures are more concerned with broad public policy than with individuals' claims and thus may not furnish an adequate remedy for the injuries that an individual suffers as a result of a union's breach of its duty of fair representation (J.A. 57-58). The court also held that it could not assume jurisdiction over petitioner's contract claim against DLI (*id.* at 61-62, 69-79, 81; Pet. App. 5a-6a).[2] On the merits, the court ruled that the union had in fact breached its duty of fair representation, but it awarded only attorney's fees and costs, finding that petitioner was not entitled to compensation for lost wages or benefits (J.A. 80-100; Pet. App. 6a).[3]

[2] The court reasoned (J.A. 69-70) that petitioner's breach of contract action was for an amount greater than $10,000 and that, under the Tucker Act (28 U.S.C. 1346(a)(2), 1491), such an action must be brought in the Claims Court. The court granted summary judgment rejecting petitioner's constitutional claims against DLI (see J.A. 81).

[3] The court found fault (J.A. 89-93; Pet. App. 6a) with respondent union's failure to consult with petitioner about its decision to arbitrate

3. The Ninth Circuit reversed the liability finding and ordered the case dismissed (Pet. App. 1a-13a). The court initially observed (*id.* at 7a-8a) that, under *Vaca* v. *Sipes*, 386 U.S. 171 (1967), a private sector employee who is injured by a union's alleged arbitrary refusal to process a grievance can sue the union for breaching its duty of fair representation and can sue the employer, under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185, for breaching the collective bargaining agreement. It pointed out that "[t]here is no statutory provision analogous to Section 301 * * * under the CSRA" (Pet. App. 8a). The court then reasoned (*ibid.*) that, although that difference between the CSRA and LMRA, standing alone, would not justify the conclusion that Congress "intended to confer upon unions unlimited discretion," the circumstances of the CSRA's enactment gave added significance to the absence of a CSRA provision permitting private enforcement of the union's duty in federal court. The court explained (*id.* at 9a) that, "[w]hen Congress enacted the CSRA[,] the federal courts had implied a duty of fair representation not only under the National Labor Relations Act[,] as in *Vaca*, but also under the Railway Labor Act[,]" in *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944); that, "[a]ware of these decisions and aware of how important *Steele*, the seminal case, had been in protecting the rights of racial minorities, Congress itself imposed the duty of fair representation on

on behalf of Kuntelos, with its failure to notify petitioner of the Kuntelos arbitration, and with its decision not to seek arbitration of petitioner's claim without considering its merits. The court awarded no compensation for lost wages or benefits, however, because it found that petitioner and Kuntelos were so evenly matched that it was speculative whether petitioner would have retained the course developer position (J.A. 93-97; Pet. App. 6a). The court did award attorney's fees and costs (J.A. 97-100; Pet. App. 6a).

federal unions"; and that, nevertheless, "Congress * * * failed to provide jurisdiction in the federal courts to enforce the duty" (Pet. App. 9a). The court concluded that, while "*[a]rgumentum ex silentio* is normally weak," "[h]ere the silence of Congress appears to be deliberate" (*ibid.*).

In so concluding, the court noted that, in negotiating the final provisions of the CSRA, the Conference Committee rejected a provision that would have authorized federal courts to order parties to collective bargaining agreements to engage in arbitration (Pet. App. 9a-10a). The court recognized that "the provision which the Conference Committee eliminated did not deal with the claim of an employee against his union" (*id.* at 10a). But the court stated that "the enforcement scheme chosen by Congress showed a strong preference for keeping the interpretation and enforcement of collective bargaining agreements within the process of arbitration, to be reviewed in the first instance by the FLRA" (*ibid.*). The court further noted that "there is an express provision that 'a labor organization which has been accorded exclusive recognition * * * is responsible for representing the interest of all employees in the unit it represents without discrimination' " (*id.* at 10a-11a (quoting 5 U.S.C. 7114(a)(1)) and that the FLRA has "the power to remedy a breach of this duty by awarding back pay * * *" (Pet. App. 11a). Hence, the court concluded, "[t]here is a fit between the duty and the remedy provided" (*ibid.*).

The court also recognized that "the FLRA has been criticized for not enforcing the duty of fair representation vigorously enough" (Pet. App. 11a). But the court noted that "[i]t is of course open to interpretation whether the small number of complaints actually issued reflects lack of zeal or lack of real problems in this area" (*id.* at 12a); hence, there was "insufficient evidence to conclude that

the FLRA does an inadequate job in protecting the rights of the individual worker" (*ibid.*). The court added: "[t]he facts of this case * * * indicate that the existence of a district court remedy after investigation and issuance of a complaint by the General Counsel may lead to a tortuous path of litigation whose costs are disproportionate to the individual benefit achieved and whose protracted twists and turnings must be as disheartening to any eventual winner as they are to any eventual loser" (*id.* at 12a-13a). It thus concluded that, "whether the microcosm of this case is studied or whether the general practice of the FLRA is reviewed, no strong reason appears to overturn what seems to be the congressional intent to channel the grievances of federal employees to the [FLRA]" (*id.* at 13a).

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner has no federal cause of action for damages against the union for breach of the union's duty of fair representation. No such cause of action is expressly granted by the CSRA. Accordingly, petitioner may sue respondent for damages in federal court only if a private right of action may be found by implication in the CSRA. We conclude from an analysis of the CSRA, using congressional intent as the focal point (*Thompson* v. *Thompson*, No. 86-964 (Jan. 12, 1988), slip op. 4), that no implied right of action to enforce the duty of fair representation may be found in the CSRA.

The statutory language that imposes the duty of fair representation (5 U.S.C. 7114(a)(1)) merely bans certain conduct; it does not speak of liability on the part of the union, let alone of a right of employees to sue for damages. Moreover, the statute does expressly establish a

comprehensive enforcement scheme, which does not provide for direct access to the courts but directs that complaints such as petitioner's be channeled through the FLRA and its General Counsel. The very existence and specificity of that remedial scheme highlight the absence of a private cause of action; and the nature of the scheme, with its policy of agency primacy, is incompatible with permitting direct access to the federal courts. Further, the legislative history of the CSRA not only contains no evidence of a congressional intent to permit a right of action; it furnishes additional evidence suggesting the exclusivity of the statutory remedies based on a congressional policy against permitting employees to bypass the FLRA.

Although employees in the private sector may sue their unions for breach of the duty of fair representation, there is substantial reason to believe that Congress, in the CSRA, did not intend to transpose the private-sector cause of action into the federal sector. In addition to the considerations of statutory language, structure, and history already adduced, it is the pre-CSRA *federal*-sector law, rather than private-sector law, that is most plausibly understood as the backdrop to the CSRA; and there was no private right of action under pre-CSRA federal-sector law. Moreover, even if the CSRA is to be read against the background of the private-sector law, Congress's departures from certain aspects of that law deserve respect, and they counsel against transposing more of the private-sector model into the CSRA than the statute expressly provides. Thus, in the private sector, both the duty of fair representation and the right of action are implied; yet Congress in the CSRA made the duty express without simultaneously making express a private right of action. And while the absence of an administrative enforcement mechanism in the private-sector statutes (at least as initially enacted) was a principal basis for this Court's recognition of a right to sue in court, Congress carefully included an administrative enforcement mechanism in the CSRA.

Finally, the reasons that this Court gave in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), for recognizing a private right of action under the NLRA do not comparably apply in the federal context. Whereas the courts preceded the federal agency in developing the law under the NLRA, the courts have not entered the field in the federal sector: hence, the value of centralizing initial decisionmaking in an expert agency can be served under the CSRA to an extent not possible under the NLRA. Also, in the federal sector, the recognition of an exclusive bargaining representative does not strip individual employees of substantial pre-existing rights and forms of redress against their employers, as it does in the private sector; there is, therefore, not a corresponding need for direct access to court as a protection for employees. And while in the private sector important practical benefits may be gained by consolidating claims against the union with related federal-court suits against the employer, no such consolidation is possible under the CSRA, which does not authorize comparable suits against the employer in federal court.

ARGUMENT

A FEDERAL EMPLOYEE HAS NO IMPLIED PRIVATE RIGHT OF ACTION IN FEDERAL COURT TO SEEK DAMAGES FOR HIS EXCLUSIVE BARGAINING REPRESENTATIVE'S BREACH OF ITS DUTY OF FAIR REPRESENTATION

We start from the proposition, which neither petitioner nor respondent union appears to dispute (Pet. 10-12; Br. in Opp. 4-5; Pet. Reply Br. 3-4; Pet. Br. 2), that Section 7114(a)(1) of the CSRA codifies a duty of fair representa-

tion for federal-sector unions that is similar if not identical to the duty of fair representation that the courts have found implicit in the exclusive bargaining power granted to private-sector unions by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, and the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*[4] We also assume, what is likewise not disputed (see, *e.g.*, Pet. Br. 10-11; Pet. 10-12; Br. in Opp. 4-5), that the duty of fair representation is enforceable by the FLRA and its General Counsel through the unfair labor practice provisions and procedures set forth in Sections 7116(b) and 7118 of the CSRA.[5]

---

[4] Section 7114(a)(1) of the CSRA (5 U.S.C.) provides:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Several courts, as well as the FLRA itself, have held that that provision fully codifies for the federal sector the duty of fair representation that has been established in the private sector by implication under the NLRA and the RLA. *See AFGE* v. *FLRA*, 812 F.2d 1326 (10th Cir. 1987); *National Treasury Employees Union* v. *FLRA*, 800 F.2d 1165 (D.C. Cir. 1986); *Ft. Bragg Ass'n of Educators*, 28 F.L.R.A. No. 118 (Sept. 4, 1987). We assume, for purposes of this case, that the provision in fact does so.

[5] Section 7116(b) of the CSRA (5 U.S.C.) provides, in pertinent part:

> For the purposes of this chapter, it shall be an unfair labor practice for a labor organization–
>
> • • • • •
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.
>
> • • • • •

Section 7118 of the CSRA (5 U.S.C.) provides, in pertinent part:

> (a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the change a written statement of the reasons for not issuing a complaint.
>
> • • • • •
>
> (7) If the Authority • • • determines after any hearing on a complaint • • • that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order–
>
> (A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;
>
> (B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;
>
> (C) requiring reinstatement of an employee with backpay in accordance with section 5596 or this title; or
>
> (D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.
>
> If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.
>
> • • • • •

The question that is in dispute, and as to which the courts of appeals are in conflict,[6] is whether the CSRA's express duty of fair representation is also enforceable by a federal employee in a federal court action for money damages and other relief.[7]

We believe that the court of appeals correctly ruled that a federal employee has no private right of action to sue a federal-sector union in federal court for breach of its duty of fair representation. Although the evidence of congressional intent is not clear-cut, it appears, on balance, that Congress intended that the duty of fair representation applicable to federal-sector unions would be enforced exclusively by the General Counsel of the FLRA, under the unfair labor practice provisions and procedures set forth in Sections 7116 and 7118 of the CSRA.

A. Petitioner has no express right of action to sue respondent union in federal court for breach of the duty of fair representation. Although the CSRA codifies a duty of

---

[6] Compare *Pham* v. *AFGE, Local 916,* 799 F.2d 634 (10th Cir. 1986), and *Naylor* v. *AFGE Local 446,* 580 F. Supp. 137 (W.D.N.C. 1983), aff'd without opinion, 727 F.2d 1103 (4th Cir.), cert. denied, 469 U.S. 850 (1984), with Pet. App. 1a-13a (9th Circuit) and *Warren* v. *Local 1759, AFGE,* 764 F.2d 1395 (11th Cir.), cert. denied, 474 U.S. 1006 (1985), and *Wilson* v. *United States Bureau of Prisons,* 770 F.2d 1078 (3d Cir 1985) (Table), aff'g 585 F. Supp. 202 (M.D. Pa. 1984).

[7] Whether a violation of the duty of fair representation is an unfair labor practice is a question presumably within the exclusive jurisdiction of the FLRA. Cf. *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959). It is a separate question whether Congress intended to create an " 'independent federal remedy' " for a violation of the duty of fair representation. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.,* No. 85-2079 (Feb. 23, 1988), slip op. 3 n.4; *Kaiser Steel Corp.* v. *Mullins,* 455 U.S. 72, 83 (1982); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 626 (1975).

fair representation (5 U.S.C. 7114(a)(1)), it does not expressly make that duty (or any other statutory duty) directly enforceable by a federal employee in a federal or state court action. Indeed, the labor-management-relations chapter of the CSRA—namely, Title VII (5 U.S.C. Ch. 71)—expressly empowers courts to act in only three instances: *first,* where a person is aggrieved by a final order of the FLRA (5 U.S.C. 7123(a)); *second,* where the FLRA petitions an appropriate court of appeals for enforcement of one of its orders or for appropriate temporary relief or a restraining order (5 U.S.C. 7123(b)); and *third,* where, upon issuing an unfair labor practice complaint, the FLRA petitions a federal district court for temporary injunctive relief (5 U.S.C. 7123(d)). Cases like the present one fall into none of those categories.

Accordingly, the duty of fair representation may be directly enforced by a federal employee in a federal court action only if a private cause of action for enforcement of the duty can be found by implication in the CSRA.[8] In determining whether a private cause of action is implied by a federal statute, the "focal point" for analysis, the Court has said, "is Congress' intent in enacting the statute." *Thompson* v. *Thompson,* No. 86-964 (Jan. 12, 1988), slip op. 4. "Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. 77, 91 (1981). See also *Thompson* v. *Thompson,* slip op. 4-5; *Daily Income*

---

[8] If such a cause of action can be found by implication in the CSRA, then 28 U.S.C. 1331 would provide federal court jurisdiction.

Fund, Inc. v. *Fox,* 464 U.S. 523, 535-536 (1984); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n,* 453 U.S. 1, 13 (1981). Following that approach, we now explain why we think that the CSRA provides an insufficient basis for finding a private cause of action for breach of the duty of fair representation.

B. 1. The language of the statute contains not even a hint that Congress intended to give federal employees the right to enforce the duty of fair representation in federal or state court actions. Section 7114(a)(1) of the CSRA provides only that "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." That statutory language does not "explicitly confer[] a right directly on" individual federal employees. *Cannon* v. *University of Chicago,* 441 U.S. 677, 690 n.13 (1979). Rather, it contains only "a ban on discriminatory conduct" by exclusive bargaining agents (*id.* at 691-693).

To be sure, the statutory ban on discriminatory conduct confers a benefit on the federal employees whom the exclusive bargaining agents represent. But "[t]he question is not simply who * * * benefit[s] from the Act" (*California* v. *Sierra Club,* 451 U.S 287, 294 (1981)); some persons presumably benefit from the imposition of every statutory duty, including those not privately enforceable. The question, instead, is whether Congress intended that the federally conferred benefit "would be enforced through private litigation." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 18 (1979). And the Court has consistently held that statutory language of the type present here, which merely confers a statutory benefit on a particular class of persons and does not create any liability, does not in itself give rise to an inference that Congress intended to create a private cause of action for enforcement

of the statutory benefit by those persons. See, *e.g., Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 145 (1985) (statute imposing liability for breach of fidicuary duties does not confer on beneficiaries of benefit plans a private cause of action for non-contractual money damages); *Universities Research Ass'n* v. *Coutu,* 450 U.S. 754, 771-784 (1981) (statutory requirement that certain federal construction contracts contain a stipulation that laborers and mechanics will be paid "prevailing wages" does not confer on employees a private cause of action for back wages); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 17-22 (statute proscribing certain fraudulent practices by investment advisors does not confer on clients of investment advisors a private cause of action for money damages).

2. "The structure of the statute[ ] similarly counsels against recognition of the implied right petitioner advocates in this case" (*Northwest Airlines, Inc.* v. *Transport Workers Union,* 451 U.S. at 93). This is not a case in which the statute shows little or no attention to the question of enforcement of the prescribed duties. The CSRA carefully specifies how and by whom the duty of fair representation is to be enforced. The nature and specificity of that statutory enforcement scheme counsel against the finding of implied remedies to supplement that scheme.

The CSRA provides that it is "an unfair labor practice for a labor organization * * * to * * * fail or refuse to comply with any provision of [Chapter 71 of 5 U.S.C.]" (5 U.S.C. 7116(b)(8)). That provision plainly encompasses the codified duty of fair representation found in Section 7114(a)(1) of the statute. The CSRA further provides a carefully crafted procedure for seeking a remedy for an unfair labor practice: thus, Section 7118 authorizes the General Counsel of the FLRA to investigate unfair labor practice charges, to issue complaints with respect to

alleged unfair labor practices, and to seek backpay and other remedial orders from the FLRA for aggrieved federal employees.[9] Finally, the statute contains an equally specific provision governing judicial review (5 U.S.C. 7123). It provides that private persons may obtain judicial review only with respect to final orders of the FLRA (5 U.S.C. 7123(a))[10]; that, in such appeals, the FLRA's findings of fact are to be conclusive if supported by substantial evidence (5 U.S.C. 7123(c)); and that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances" (5 U.S.C. 7123(c)).

---

[9] When, after the General Counsel pursues a complaint, the FLRA is called on to decide the merits and finds that a labor organization has breached its duty of fair representation, the FLRA has broad remedial discretion under 5 U.S.C. 7105(g)(3). The FLRA exercises that authority where appropriate to grant "make whole" relief to any employee adversely affected by the union's breach of duty. See, *e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers, Local 39*, 24 F.L.R.A. 352 (1986) (where union erroneously failed to file grievance over employee's suspension, union was ordered to pay employee his lost earnings if it was unable to obtain employer's permission to file grievance out of time); *AFGE, Local 1857*, 28 F.L.R.A. (No. 86) 677 (Aug. 21, 1987) (where union discriminatorily excluded unit employee from grievance settlement concerning backpay for overtime work negotiated with employer, union ordered to pay the employee backpay if it was unable to secure backpay for the employee from the employer).

[10] For example, in this case, if the FLRA had decided the merits of petitioner's complaint adversely to him or failed to award adequate relief, he could have sought judicial review of the FLRA's final order in an appropriate court of appeals.

If the FLRA had found that the union breached its duty and ordered a remedy, and the union then failed to comply with the order, the FLRA could have sought enforcement of the order in an appropriate court of appeals under 5 U.S.C. 7123(b).

Where other statutes have contained such comprehensive and integrated enforcement schemes, the Court has said that private causes of action should not be found by implication. See, *e.g.*, *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 146-147 & n.15; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18-19; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571-574 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). Rather, "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement" (*Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 97). That presumption applies in this case, not only because of the completeness of the CSRA's enforcement scheme, but because recognizing the particular remedy that petitioner suggests may be found by implication (direct action in court) would work a striking departure from the statutory enforcement scheme, which channels claims like petitioner's through a specialized administrative agency.

3. No statement made in the legislative history of the CSRA speaks directly to the question presented here. But a number of statements made and actions taken in the proceedings leading to enactment of the statute tend to confirm the exclusivity-of-FLRA-review policy that is suggested by the express terms of the enforcement scheme. Thus, the legislative history suggests that Congress intended that the duty of fair representation would be enforced exclusively at the instance of the General Counsel of the FLRA, under the unfair labor practice provisions and procedures established in Sections 7116 and 7118 of the CSRA.[11]

---

[11] As petitioner observes (Pet. Br. 23-24), Representative Ford expressly referred to the duty of fair representation, stating (124 Cong.

First, in discussing the availability of judicial review for actions arising under the CSRA, the House Report states that "the General Counsel of the Authority makes the final decision as to the issuance of a complaint of an unfair labor practice." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 52 (1978). In addition to thus underscoring the intended pivotal role of the FLRA General Counsel, the House Report also highlights the intended exclusivity of the express statutory mechanisms for judicial review (as described above): "Only those labor-management relations matters specifically referred to in section 7123 shall be judicially reviewable." *Ibid.* The Senate Report similarly expresses a commitment to channeling of challenges like petitioner's through the FLRA, stating: "All complaints of unfair labor practices • • • that cannot be resolved by the parties shall be filed with the FLRA." S. Rep. 95-969, 95th Cong., 2d Sess. 107 (1978). Finally, as the court below noted (Pet. App. 9a-10a), the Conference Committee took action that further suggests the incompatibility with the CSRA of a judicially found implied cause of action for direct judicial review of disputes growing out of collective bargaining agreements. The House proposed a provision that would have authorized direct action in federal court by a party to a collective bargaining agreement for an order directing the other party to engage in arbitration. The Conference Committee rejected that provision, explaining: "All questions of this matter will be considered at least in the first instance by the [FLRA]." H.R. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978).

Rec. 38717 (1978)): "The labor organization is required to meet a duty of fair representation for all employees, even if not dues-paying members, who use the negotiated grievance procedure." That statement merely asserts the existence of the duty. It does not address the question of direct judicial enforcement through a private cause of action.

This legislative history is difficult to reconcile with recognition of a private cause of action for enforcement of the duty of fair representation. If such a cause of action were recognized, a federal employee presumably could completely bypass both the unfair labor practice provisions and procedures and the expert administrative agency that administers them. Yet the congressional history strongly suggests that Congress contemplated a channeling of all disputes over alleged unfair labor practices through the FLRA. The evidence of that understanding supplies "one more piece of evidence that Congress did not intend to authorize a cause of action" (*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 22).

Adding an implied right of action to the statutory enforcement scheme would also tend to frustrate one of Congress's more general purposes in the CSRA, a purpose that this Court explained and relied on in *United States* v. *Fausto*, No. 86-595 (Jan. 25, 1988). The Court there held that a non-veteran, excepted service federal employee could not challenge a 30-day suspension in the Claims Court, even though a pre-CSRA remedy existed and the CSRA provides *no* alternative administrative or judicial remedy. In reaching that conclusion, the Court emphasized that the CSRA's legislative history strongly reflected congressional dissatisfaction with the " 'wide variations in the kinds of decisions • • • issued on the same or similar matters,' " "which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims" (slip op. 5 (citation omitted)). And the Court observed (slip op. 9-10 (quoting S. Rep. 95-969, *supra*, at 52)) that the primacy of the Merit System Protection Board and the Federal Circuit in certain matters serves the congressional purpose of "enabl[ing] the development, through the MSPB, of a unitary and consistent Executive Branch position on matters

involving personnel action, avoids an 'unnecessary layer of judicial review' in lower federal courts, and '[e]ncourages more consistent judicial decisions * * *.' " In the present context, although the courts of appeals play a role in the development of the duty of fair representation (through review of FLRA orders under Section 7123), the primacy of the FLRA and its General Counsel in the definition and enforcement of the union's duties serves much the same policies.

4. In his brief, petitioner does not directly undermine the force of the foregoing considerations. Rather, petitioner's argument rests on the contention that Congress must have intended to borrow for the federal employment context the implied right of action recognized in the private context. In particular, petitioner suggests that the policies that underlie this Court's recognition of such a cause of action in the private setting apply under the CSRA as well.

To be sure, when Congress enacted the CSRA and its express duty of fair representation, this Court had previously recognized implied causes of action under both the NLRA and the RLA for enforcement of the duty of fair representation applicable to private-sector unions. See *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (NLRA); *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192 (1944) (RLA). This Court has said that, "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts," the relevant "question is whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378-379 (1982). See also *Cannon* v. *University of Chicago*, 441 U.S. at 696-699. But, in the present context, Congress did not act against the background of a pre-existing remedy in the federal sector, only the analogy to such a remedy in the private sector; and the

policies underlying the private-sector remedy do not carry over with comparable force to the federal sector. Accordingly, there is substantial reason to believe that Congress did not intend to extend the private-sector cause of action to the federal sector.

a. The principle that a new statute presumptively carries forward a pre-existing remedy does not apply here. Prior to the enactment of the CSRA in 1978, federal-sector labor relations were governed by executive orders. Exec. Order No. 10,988, 3 C.F.R. 521 as amended by subsequent executive orders (see Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Order Nos. 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.)). See Brower, *The Duty of Fair Representation Under the Civil Service Reform Act: Judicial Power to Protect Employee Rights*, 40 Okla. L. Rev. 361, 369-371 (1987); see generally *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 91-93 (1983). When the CSRA was enacted, the courts had almost uniformly held that the provisions of the Executive Orders were not judicially enforceable (because the Executive Orders were not "law[s] of the United States" within the meaning of 28 U.S.C. 1331). See, *e.g.*, *Stevens* v. *Carey*, 483 F.2d 188, 190 (7th Cir. 1973); *Local 1498, AFGE* v. *AFGE*, 522 F.2d 486, 491 (3d Cir. 1975); *Kuhn* v. *National Ass'n of Letter Carriers*, 570 F.2d 757, 760-761 (8th Cir. 1978). See generally *United States* v. *Professional Air Traffic Controllers Org.*, 653 F.2d 1134, 1137 (7th Cir. 1981), cert. denied, 454 U.S. 1083 (1981). Hence, the pre-CSRA law applicable to federal employees did not include a private right of action to enforce unions' duty of fair representation. Congress did not expressly alter that law.

Petitioner's premise, of course, is that the analogy to the private-sector labor law should suffice for finding an implied right of action in the CSRA. But it is at least equally

plausible that the 1978 Congress viewed the pre-CSRA *federal*-sector law as the backdrop to its legislation. Indeed, the discussions of the CSRA's labor-management-relations provisions in the congressional committee reports provide far more support for the latter approach to construing the CSRA than for the former (see S. Rep. 95-969, *supra*, at 97-115; H.R. Rep. 95-1403, *supra*, at 38-62; H.R. Rep. 95-1717, *supra*, at 152-159); and this Court has generally looked to pre-CSRA federal-sector law in construing the CSRA (see, *e.g.*, *United States* v. *Fausto*, *supra*; *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. at 100-107). More particularly, the language of Section 7114(a)(1) of the CSRA, which creates an express duty of fair representation that is similar if not identical to the implied duty of fair representation under the NLRA and the RLA, is taken almost verbatim from Exec. Order No. 11,491.

In any event, even if Congress understood the NLRA and RLA caselaw as part of the "contemporary legal context" in which it enacted Section 7114(a)(1) (cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 381), the language, structure, and legislative history of the CSRA, as discussed above, suggest that Congress may have made a considered judgment *not* to create an analogue to the private cause of action for the enforcement of the duty of fair representation recognized by the courts in NLRA and RLA cases. Thus, whereas both the duty of fair representation and the private right of action for its enforcement are merely *implied* under the NLRA and RLA, Congress included in the CSRA a provision (5 U.S.C. 7114(a)(1) (second sentence)) that renders express only the duty, not the private right of action. Moreover, neither the RLA, nor the NLRA as originally enacted, contained any administrative mechanism for enforcing a duty of fair representation against unions, and the absence

of an administrative remedy was a principal reason this Court offered for finding private rights of action implied by those statutory schemes. See *Vaca* v. *Sipes*, 386 U.S. at 180-183; *Steele* v. *Louisville & N.R.R.*, 323 U.S. at 205-207. See generally *Cannon* v. *University of Chicago*, 441 U.S. at 733-734 (Powell, J., dissenting). In the CSRA, by contrast, Congress expressly established such an administrative mechanism for enforcing the duty of fair representation.

In short, Congress expressly made violation of the duty of fair representation an unfair labor practice enforceable through a specified administrative process without simultaneously expressly providing for a judicial cause of action. As we have explained, that combination suggests, even without reference to the NLRA and RLA, that Congress considered private litigation to be an inappropriate means of enforcing the duty. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 20-21; cf. *Bush* v. *Lucas*, 462 U.S. 367, 388-390 (1983) (no judicial damage remedy for a wrong that can be remedied through the comprehensive scheme established by the CSRA). But it also suggests that, if, as petitioner proposes, Congress had its eye on the private-sector statutes and caselaw when enacting the CSRA, Congress's departures from the private-sector model should be respected.

b. That the private-sector model is not a sufficient basis for finding an implied right of action in the federal sector is further supported by recognition of the limited extent to which the analysis used by this Court in upholding a private right of action in *Vaca* v. *Sipes*, *supra*, carries over to the CSRA context. In *Vaca*, this Court held that, when Congress amended the NLRA to add an unfair labor practice provision that the National Labor Relations Board (NLRB) later interpreted to address duty of fair representation issues, Congress did not implicitly repeal

the private cause of action that the courts had previously recognized under that statute. The Court gave three reasons: (a) "[a] primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation" (386 U.S. at 180-181); (b) "the unique interests served by the duty of fair representation doctrine" in the NLRA context would be frustrated by refusal to recognize a private right of action under that statute (*id.* at 181-183); and (c) "intensely practical considerations • • • emerg[ing] from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining [agreements]" favor recognition of a judicial cause of action for enforcement of the duty of fair representation (*id.* at 183-188). But each of those reasons is largely or wholly inapplicable in the CSRA context, which further suggests that Congress did not intend that the CSRA's duty of fair representation would be enforced through private litigation.

First, in the CSRA context, the principal justification for making the administrative remedy exclusive—*i.e.*, avoidance of conflicting rules and reliance on administrative expertise—applies with full force to the duty of fair representation. Under the NLRA, the courts began developing the doctrine that became the duty of fair representation well before the NLRB had any basis for assuming jurisdiction over such cases. By contrast, the CSRA specifically directs the FLRA to define and enforce the duty of fair representation applicable to federal-sector unions, and the FLRA has been active from the statute's inception in doing so. See, *e.g.*, *National Treasury Employees Union*, 10 F.L.R.A. No. 91 519 (Nov. 23, 1982),

aff'd, 721 F.2d 1402 (D.C. Cir. 1983); *National Federation of Federal Employees*, 24 F.L.R.A. 320 (1986), petition for review dismissed *sub nom. Thompson* v. *FLRA*, 830 F.2d 1130 (11th Cir. 1987) (Table). In the federal sector, no judicial presence preceded the administrative presence. Hence, the question presented is not, as it was in *Vaca* v. *Sipes*, whether Congress intended to "oust the courts of their traditional jurisdiction" (386 U.S. at 183); the question here is quite different—whether there is a basis for inferring congressional intent to grant a direct role to the federal courts when no such grant was made explicit.

Accordingly, in the CSRA setting there is no impediment to giving effect to an evident statutory commitment to the primacy of agency decisionmaking in this area. To be sure, the courts play a role in developing and enforcing the duty of fair representation through review of FLRA orders under 5 U.S.C. 7123. But judicial review under the provision is carefully limited to circumstances in which the FLRA has had an opportunity to act first. The entry of the courts directly into this field of decisionmaking can only produce confusion and inconsistency.

As a practical matter, moreover, there can be no doubt that the FLRA brings substantial pertinent expertise to the area. Section 7117 of the CSRA charges the FLRA (and not the courts) with the responsibility for making "negotiability" determinations; that responsibility provides the FLRA with considerable insight into how a union formulates bargaining proposals and the reasons why a union engages in particular give-and-take at the bargaining table. In addition, whereas in the private sector courts directly review arbitration awards in actions brought under Section 301 of the LMRA, the situation is different in the federal sector: Section 7122 of the CSRA (5 U.S.C. (& Supp. IV)) charges the FLRA (and not the courts), with certain exceptions, with the responsibility for reviewing

arbitration awards. Through this process, the FLRA has gained experience with union grievance and arbitration practices—experience that the courts cannot hope to duplicate.

Second, in the CSRA context, declining to supplement the unfair labor practice provisions with a private cause of action will not seriously undermine the substantial "unique interests" that the duty of fair representation doctrine serves. The Court in *Vaca* v. *Sipes* stressed that, in the private sector at issue there, the statutory grant of exclusive bargaining power to unions deprives individuals of their pre-existing right to make and enforce contracts with their employers. The duty of fair representation thus stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" (*Vaca* v. *Sipes,* 386 U.S. at 182). But the same cannot be said of the CSRA context, for, while some employees might of course fare better in the federal sector without recognition of an exclusive bargaining representative, recognition of an exclusive representative in the federal sector does not result in the same loss of pre-existing rights as it does in the private sector.

To begin with, in the federal-sector, employment is a result of appointment, not of contract. See, *e.g., Army & Air Force Exch. Serv.* v. *Sheehan,* 456 U.S. 728, 735-741 (1982). Thus, the employee generally has no right to make or enforce an individual contract of employment with his agency-employer (see, *e.g.,* 48 C.F.R. 37.104(a) and (b)), and hence the employee is not stripped of any such rights by the recognition of an exclusive bargaining representative. Moreover, the exercise of exclusive bargaining power by the union cannot deprive any individual of otherwise-available mechanisms for challenging employment actions like that at issue here. Thus, Section 7114(a)(5) precludes

the exclusive representation rights of a union from being construed to bar any individual from exercising any "grievance or appellate rights established by law, rule, or regulation." See *National Treasury Employees' Union* v. *FLRA,* 800 F.2d 1165, 1170 (D.C. Cir. 1986). And Section 7121(e)(1) makes clear that an employee aggrieved by an "adverse action," including a removal, reduction in grade or pay (as here), or suspension for more than 14 days, has the option to bypass the grievance procedure specified in the collective bargaining agreement and to pursue instead the statutory appeals procedure under Section 7701. See *Morales* v. *MSPB,* 823 F.2d 536, 538 (Fed. Cir. 1987); see also *Devine* v. *Pastore,* 732 F.2d 213, 216 (D.C. Cir. 1984) (standards of review by arbitrator and by MSPB are the same). Hence, recognizing an exclusive bargaining representative in the federal sector simply does not strip employees of the same kinds of pre-existing rights that recognizing a union in the private sector does.[12] In particular, petitioner has not suggested how the CSRA deprived him of any rights he would otherwise have had or have been contractually able to obtain against his employer with respect to the promotion at issue. See *United States* v. *Testan,* 424 U.S. 392 (1976); *Arnett* v. *Kennedy,* 416 U.S. 134 (1974).

Accordingly, while the duty of fair representation stands as a desirable bulwark against arbitrary and capricious union action in the federal sector, a private right of action would not play the same critical role in the federal sector that it does in the private sector. To the ex-

---

[12] Substantively, too, the range of matters that are within the scope of collective bargaining in the federal sector is substantially narrower than in the private sector. See, *e.g.,* 5 U.S.C. 7106 (management rights provision covering, among other things, authority to hire, to fire, to assign work, to discipline), 7117 (limiting bargaining as to matters within scope of federal laws, rules, or regulations). See *FLRA* v. *Aberdeen Proving Ground,* No. 86-1715 (Apr. 4, 1988).

tent that the private cause of action was deemed necessary in the private sphere because the grant of exclusive representation authority deprives employees of pre-existing (judicially enforceable) rights against the employer, that need is appreciably less in the federal sphere because there is no comparable sacrifice of rights. The focus, therefore, must simply be on enforcing the duty of fair representation as a restriction on unions; and there is every reason to believe that the duty can effectively be enforced in the same manner as any other limitation on the power of federal-sector unions—by the General Counsel of the FLRA, using his discretionary authority under the unfair labor practice provisions and procedures of the CSRA. Cf. *Vaca* v. *Sipes*, 386 U.S. at 182-183 (unreviewable discretion of NLRB General Counsel significant *because* employees are deprived of pre-existing forms of redress by enactment of federal labor laws).[13]

[13] As the court below recognized (Pet. App. 11a-12a), there is no basis for suggesting that the General Counsel of the FLRA has failed to enforce the duty of fair representation. See also *Warren* v. *Local 1759, AFGE*, 764 F.2d at 1399 n.6 ("unpersuaded by Appellant's argument that the FLRA lacks zeal in prosecution of duty of fair representation claims"). Indeed, we are advised by the FLRA General Counsel's Office that, from 1984 to the present, the percentage of complaints issued against unions in cases charging violations of the duty of fair representation has been approximately the same as the percentage of complaints issued against unions arising out of all charges filed for any reason. In all events, as we have noted in the text, Congress appears to have intended in the CSRA that federal employees would be subject to the General Counsel's unreviewable discretion on duty of fair representation charges (and all other unfair labor practice charges). Cf. *Redington*, 442 U.S. at 568 (citation omitted) (" 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person' ").

In this case, we note, the General Counsel settled the unfair labor practice charge without awarding petitioner individual relief because he concluded that, in the circumstances presented here, the union had no duty to invoke arbitration on behalf of petitioner. See First Amended Complaint, Exh. 19 (letter date Nov. 24, 1980, to petitioner's counsel from Assistant General Counsel for Appeals). The reasonableness of the settlement is shown by the district court's finding that petitioner and Mr. Kuntelos were so evenly matched that petitioner was not entitled to direct compensation for loss of the job at issue. See note 3, *supra*.

Third, in the federal sector, recognition of a private cause of action for enforcement of the duty of fair representation is not supported by "intensely practical considerations" that emerge from the relationship between the duty of fair representation and the enforcement of collective bargaining agreements. Those practical considerations arise in the private sector because collective bargaining agreements are enforceable in court under Section 301 of the LMRA, 29 U.S.C. 185. Recognizing an independent cause of action for enforcement of the duty of fair representation allows the courts to consolidate such claims with breach of contract actions and to fashion comprehensive and appropriate remedies. See *Vaca* v. *Sipes*, 386 U.S. at 187-188; see also *Bowen* v. *United States Postal Service*, 459 U.S. 212 (1983) (damages to be apportioned between employer and union).

The CSRA, however, does not contain an equivalent to Section 301 of the LMRA. And, as we have noted (page 18, *supra*), the Conference Committee specifically rejected a provision that would have allowed courts to entertain an important class of such suits (those involving efforts to compel arbitration). It did so, moreover, precisely in order to ensure that "[a]ll questions of this matter will be considered at least in the first instance by the Authority" (H.R. Rep. 95-1717, *supra*, at 157).

Hence, the practical benefits associated with the recognition of a private right of action to enforce the duty of

fair representation in the private sector would not be achieved in the federal sector.[14] Rather, it is the practical benefits of channeling claims like petitioner's through a single agency that Congress is best understood as having tried to achieve. Recognition of an implied right of action is not compatible with that goal.

---

[14] The comprehensiveness of the CSRA, combined with the absence of an express provision authorizing suits for breach of the collective bargaining agreement, precludes a suit for that purpose against the agency-employer. Cf. *United States* v. *Fausto, supra.* Moreover, at least two courts have held that the Tucker Act (28 U.S.C. 1346(a)(2), 1491) does not provide a basis for an action against an agency-employer for violating its collective bargaining agreement. See *Serrano Medina* v. *United States*, 709 F.2d 104 (1st Cir. 1983); *Yates* v. *Soldiers' & Airmen's Home*, 533 F. Supp. 461, 465 n.8 (D.D.C. 1982); see also *Leath* v. *Stetson*, 686 F.2d 769 (9th Cir. 1982). Even if the Tucker Act provided such a basis, however, any claim for more than $10,000 would lie only in the Claims Court, which plainly could not provide a remedy for a breach of the duty of fair representation because the union would not be a party. See J.A. 71 n.1. Thus, proceedings would be bifurcated in many cases, even if the employer-agency could be sued in court on the contract.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. TARANTO
Assistant to the Solicitor General

WILLIAM E. PERSINA
Acting Solicitor

ARTHUR A. HOROWITZ
Associate Solicitor
Federal Labor Relations Authority

OCTOBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988 – 241-699/80719